SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1404

RALPH P. COUNSELMAN,

Petitioner,

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

MICHAEL F. KEOGH,
J. ROBERT CAREY,
RICHARD H. LOVE,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Ralph P. Counselman, by his attorneys, prays that a Writ of Certiorari issue to the United States Emergency Court of Appeals to review a final judgment of that Court entered in the above entitled cause on April 23, 1947 (R. 234).

Opinion Below

The only opinion of the Courts below was that of the Emergency Court of Appeals (R. 229), 159 Fed. 2d —.

Statement of the Matter Involved

On April 5, 1943, complainant was indicted in the District Court of the United States for the District of Columbia for violations of Revised Maximum Price Regulation 169, issued by the Price Administrator pursuant to the Emergency Price Control Act. Petitioner filed a demurrer and a motion to quash to said indictment and after the same were overruled, entered a plea of guilty to said indictment, and on March 1, 1946, was sentenced to pay a fine of $4,300.

Thereafter on March 4, 1946, petitioner filed in the District Court of the United States for the District of Columbia an application for leave to file a complaint in the Emergency Court of Appeals, and upon leave being granted, filed his complaint in the Emergency Court of Appeals under Section 203(e) of the Emergency Price Control Act of 1942 as amended. After answer was filed by the respondent, petitioner then filed, in accordance with Rule 18(a) of the rules of the United States Emergency Court of Appeals, an application for leave to introduce evidence. By order of the Court on May 27, 1946, petitioner was authorized to introduce the evidence described in his application with but few exceptions. On July 11, 1946, petitioner filed a motion to produce (R. 197) and asked the Court for an order requiring the respondent to make available to the complainant certain information in the possession and control of the respondent. On July 20, 1946, the Court amended its order of May 27th authorizing the introduction of evidence and on July 24, 1946, the Court denied the motion to produce (R. 210-211).

Evidence was then introduced to the Administrator, pursuant to the amended order of July 20, 1946, and on November 6, 1946, the respondent filed a transcript of proceedings before the Price Administrator. On November 19, 1946, petitioner filed a motion for leave to subpoena and examine

witnesses (R. 214), setting forth the names of various employees and officials of the Office of Price Administration, some of whom having testified before Congress that the regulation in question was illegal. The motion for leave to subpoena and examine witnesses was denied by the Court without oral argument on December 5, 1946 (R. 219). On December 13, 1946, petitioner filed a motion for reconsideration or alternative relief (R. 220) asking the Court to reconsider its denial to the petitioner of the right to subpoena, or in the alternative to set forth findings and conclusions of fact and law upon which the Court's order was based. In this motion petitioner pointed out that the record might be found by the Court to be insufficient to justify a finding that the regulation in question was invalid. On December 20, 1946, without oral argument the Court again denied petitioner's motion without opinion (R. 225). Thereupon briefs were submitted on behalf of petitioner and respondent, the case was argued, and the Court handed down its opinion on April 23, 1947, and among other reasons for dismissing the complaint, stated: "Complainant has failed to sustain the burden of proof resting upon him in this matter" (R. 231).

Jurisdictional Statement

The jurisdiction of this Court is invoked under Act of Congress, January 30, 1942, Chap. 26, Title II, Sec. 204(d) 56 Stat. 23 as amended (50 App. U. S. C. A. 924(d)), which provides:

> "Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a Writ of Certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a Circuit Court of Appeals, as provided

in Section 240 of the Judicial Code as amended (USC 1934 Ed., Title 28, Sec. 347)."

Whether or not Congress can devise a procedure for the trial of a criminal case which results in a denial to a defendant of the right to have compulsory process in his favor, is a question of general importance which should be decided by this Court. In the instant case the United States Emergency Court of Appeals in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is a question of substance, therefore, whether when there is a splitting of the criminal trial for violations of an administrative regulation, the specially created emergency court can preclude the defendant from establishing the invalidity of the regulation by depriving him of the right of subpoena.

Questions Presented

1. Can Congress devise a procedure in a criminal case which results in a denial to the defendant of the right to have compulsory process in his favor?

2. Did the action of the Emergency Court of Appeals in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses deprive the petitioner of the due process of law guaranteed by the Fifth and Sixth Amendments to the United States Constitution?

3. Did the Emergency Court of Appeals err in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses?

4. Did Congress intend, by taking away from the District Court the power to pass upon the validity of an administrative regulation issued under the Emergency Price

Control Act, to take away a defendant's right to issue subpoenaes in connection with the issue of validity?

5. Where there is a splitting of the criminal trial for violations of an administrative regulation, can the court specially created to determine the issue of validity preclude the defendant from establishing the invalidity of the regulation by depriving him of the right of subpoena?

6. Did the United States Emergency Court of Appeals err in dismissing the complaint filed herein on the ground that complainant failed to sustain the burden of proof, when it had denied complainant's motion to produce and motion for leave to subpoena and examine witnesses?

Reasons Relied On for Allowance of Writ

In view of the earlier decisions of this Court upholding the constitutionality of the Emergency Price Control Act, the issues raised in this case involve an important question of federal law which has not been but should be settled by this Court. In the case of *Yakus* v. *U. S.*, 64 S. Ct. 660; 321 U. S. 414, 446, this Court held:

> "As we have pointed out such a requirement is objectionable only if by statutory command or in operation it will deny to those charged with violations an adequate opportunity to be heard on the question of validity."

The Court further stated:

> "Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision as they

may be whether they arise in the Emergency Court of Appeals or in the District Court upon a criminal trial."

In the present case it is respectfully submitted that by depriving the petitioner of the right of subpoena, the Emergency Court of Appeals precluded the petitioner from establishing the invalidity of the regulation in question.

Equally important is the fact that in acting as it did the Emergency Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays, that this Court may issue a Writ of Certiorari to the United States Emergency Court of Appeals directing it to certify and send to this Court a full and complete transcript of the record therein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed with costs, and for such other and further relief as may be appropriate.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1404

RALPH P. COUNSELMAN,

Petitioner,

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the United States Emergency Court of Appeals in the above entitled cause will be found in 159 F. (2d) — (R. 266).

Jurisdiction

The petitioner claims that he is entitled to have the opinion and judgment of the United States Emergency Court of Appeals reviewed by virtue of Section 204(d) of the Emergency Price Control Act as amended, for the following reasons:

1. The United States Emergency Court of Appeals has dismissed the complaint filed therein by petitioner on the ground that the petitioner failed to sustain the burden of

proof resting upon him, but said Court departed from the accepted and usual course of judicial proceedings when it denied petitioner's motion to produce and motion for leave to subpoena and examine witnesses.

2. The Emergency Court of Appeals denied to the petitioner the due process of law guaranteed to him by the Fifth and Sixth Amendments, depriving him of the right to have compulsory process for the attendance of witnesses in his favor.

3. It is a question of substance and general importance as to whether a defendant who is charged with violating an administrative regulation and who has resorted to the statutory procedure, can be precluded from establishing its invalidity.

Specifications of Error to Be Urged

1. The Emergency Court of Appeals erred in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses.

2. The United States Emergency Court of Appeals erred in dismissing petitioner's complaint on the ground that he had failed to sustain the burden of proof when it had denied his motion to produce and his motion for leave to subpoena and examine witnesses.

3. The United States Emergency Court of Appeals denied to the petitioner the due process of law guaranteed him by the Fifth and Sixth Amendments by depriving him of the right to have compulsory process for the attendance of witnesses, thereby precluding him from establishing the invalidity of the regulation.

Summary of Argument

1. If certain issues in the trial of a criminal case must be determined in a special tribunal, the entire case and the

trial of the special issues do not lose their identity as a criminal procedure.

2. A Defendant in all criminal prosecutions has the right to have compulsory process for obtaining witnesses in his favor.

3. The Emergency Court of Appeals in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses deprived the petitioner of the due process of law guaranteed by the Fifth and Sixth Amendment to the Constitution.

Argument

1

If certain issues in the trial of a criminal case must be determined in a special tribunal, the entire case and the trial of the special issues do not lose their identity as a criminal procedure.

It has been held many times by the Supreme Court of the United States that the due process clause does not require any particular form or method of procedure but that its requirements are satisfied if the person affected by the proceeding has reasonable notice and reasonable opportunity to be heard and to present evidence, due regard being had to the nature of the proceedings and the character of the rights which may be affected. *Hurwitz* v. *North*, 271 U. S. 40.

The instant case had its origin in a criminal proceeding in the District Court of the United States for the District of Columbia, where the petitioner was indicted for violation of a regulation promulgated under the Emergency Price Control Act. Because of the Provisions of the Emergency Price Control Act the proceedings were divided so that the District Court could not pass upon the validity of

the regulation in question which had been placed in issue by the petitioner as his defense. This petitioner, unlike those in the *Yakus* case, did follow the procedure outlined by the Emergency Price Control Act and after having taken the necessary procedural steps did raise in the Emergency Court of Appeals the question of the validity of the regulation in question. However separated from the original criminal trial this determination of the validity of the regulation might be and whatever may be the form of the procedure before the Emergency Court of Appeals, nevertheless, the determination before that court must be considered to be part and parcel of the initial criminal proceeding. In the ordinary case where a person is accused of the violation of a regulation or law, he may defend himself in the trial court by a showing that the regulation or statute which he is charged of violating is itself in violation of the fundamental law of the United States and if the establishment of that defense requires factual support, he has the right guaranteed by the Sixth Amendment to the Constitution of the United States to have compulsory process for obtaining witnesses in his favor. If the issues relating to one item of defense to be raised in a criminal case by statute must be tried before a special tribunal, then the defendant must have equal facilities to be heard and present evidence as he would have had before the regular trial tribunal. That equal facility to be heard and present evidence would certainly include the right to have subpoenaes issued in his behalf for the compulsory attendance of witnesses possessed with the facts necessary to prove the defense. Short of this right the defendant is not afforded judicial remedies adequate to the protection of his rights, and equivalent to those guaranteed to him by the Constitution.

2

A defendant in all criminal prosecutions has the right to have compulsory process for obtaining witnesses in his favor.

In 70 *Corpus Juris* at p. 35, we find:

> "At common law a person accused of crime could not as a matter of right demand compulsory process for his witnesses, but under Constitutional and statutory provisions a person accused of crime has the right to have compulsory process for obtaining the attendance of witnesses in his behalf. The right, when guaranteed by the Constitutional provision, is a real, substantive and absolute one which may be exercised or waived by the accused, but of which he may not be deprived by the court, jury or legislatures."

This right of a defendant in a criminal case to have compulsory attendance of witnesses in his favor is such a fundamental right and so seldom has it been denied, that few decisions are found relating to it. In the case of *Dupuis* v. *U. S.*, 5 Fed. 2d 231, it was held that when the defendant's witnesses are to be prosecuted at the expense of the Government, that it was a matter of discretion for the trial judge. In the case of *U. S.* v. *Aaron Burr,* Fed. Cas. No. 14692d, it was held that any person charged with a crime in the courts of the United States has a right before, as well as after, indictment to the process of the court to compel the attendance of his witnesses. In the case of *Bridwell* v. *Aderhold*, 13 Fed. Supp. 253, the district judge in ruling that the accused had waived his right to counsel, which ruling was reversed by this Court in the case of *Johnson* v. *Zerbst,* 304 U. S. 458, stated:

> "The (Sixth) Amendment guarantees this right to the accused in all criminal prosecutions. There is no

> limitation of these rights to cases where the accused is charged with a capital offense as urged by respondent and no reason appears in logic, morals or humanity why an accused in danger of deprivation of his life or liberty, should in any criminal prosecution be deprived of these rights by implication. These are fundamental rights which the courts should safeguard with meticulous care and award to the accused whether requested or not, unless waived by him in a manner showing his express and intelligent consent."

In the case of *Holden* v. *Hardy*, 169 U. S. 366, 386, 42 L. Ed. 789, 18 S. Ct. 383, the Court in discussing the difficulty in defining with exactness the phrase "due process of law", stated:

> "The earlier practice of the common law which denied the benefit of witnesses to a person accused of felony had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."

Regardless of the foregoing authorities, it is significant that Rule 29 of the United States Emergency Court of Appeals, which rule is entitled "Table of Fees", provides for a fee to be paid for the issuance of a subpoena or other writ or process. It is submitted, therefore, that the procedure devised by Congress in the Emergency Price Control Act did not deny to the petitioner the right to have compulsory process in his favor exercised in the United States Emergency Court of Appeals.

3

The Emergency Court of Appeals in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses deprived the petitioner of the due process of law guaranteed by the Fifth and Sixth Amendments to the Constitution.

The question of invalidity of the regulation promulgated by the Office of Price Administration involves a determination of whether or not the Administrator's action was arbitrary and capricious and whether the regulation failed to conform to the statutory standards required by the Act. All this requires in the way of proof extrinsic economic data. In the instant case the petitioner, by the denial of his motion to produce and subsequently by the denial of his motion for leave to subpoena and examine witnesses, was denied access to the very source of evidence required to establish the invalidity.

In discussing the procedural features of the Emergency Price Control Act, this Court in *Yakus* v. *U. S.*, 321 U. S. 414, 444, the Court said:

> "There is no Constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process as is the case here."

Again, Page 446, the Court said:

> "As we have pointed out, such a requirement is objectionable only if by statutory command *or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity.*"

Again on Page 447 the Court said:

> "Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds."

On Page 433 the Court said:

> "As with the present statute it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. Bradley *v.* Richmond, 227 U. S. 477; First National Bank *v.* Weld County, 264 U. S. 450; Anniston Mfg. Co. *v.* Davis, 301 U. S. 337."

In the present case the petitioner endeavored to obtain evidence by a motion to produce. Later he endeavored to secure evidence and asked for the right of subpoena. When both of these means were denied him, can it be said that he was afforded "a reasonable opportunity to be heard and present evidence"? It is urged that the procedure in the instant case in the United States Emergency Court of Appeals falls short of the due process requirements as outlined in the case of *Yakus* v. *U. S.* It is respectfully submitted, therefore, that in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses, the Emergency Court of Appeals deprived the

petitioner of the due process of law guaranteed to him by the Fifth and Sixth Amendments to the United States Constitution.

Conclusion

In conclusion, it is respectfully submitted that this Court should grant a Writ of Certiorari to the end that the aforementioned judgment entered in this cause against your petitioner, in the United States Emergency Court of Appeals, may be reviewed and reversed by this Court.

Respectfully submitted,

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CITATIONS

748784—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1404

RALPH P. COUNSELMAN, PETITIONER

v.

EARL W. CLARK, DIRECTOR, LIQUIDATION DIVISION, DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 229–233) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on April 23, 1947 (R. 234). The petition for a writ of certiorari was filed on May 23, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. (Supp. V) 924 (d)).

making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether the United States Emergency Court of Appeals, in a proceeding brought under Section 204 (e) of the Emergency Price Control Act of 1942, as amended, abused its discretion in denying petitioner's motion, filed out of time, for leave to subpoena and examine certain named Office of Price Administration officers and employees.

STATUTE INVOLVED

The statutory provisions involved are contained in Section 204 of the Emergency Price Control Act of 1942, as amended, Appendix, *infra*, pp. 8–12.

STATEMENT

On April 5, 1943, petitioner was indicted in the District Court of the United States for the District of Columbia for violations of a regulation issued by the Price Administrator pursuant to the Emergency Price Control Act of 1942, as amended, and, after entering a plea of guilty, petitioner was sentenced on March 1, 1946, to pay a fine of $4,300[1] (R. 177).

[1] From the figures submitted by petitioner, the extent of his black market operations—the difference between his actual net sales figures and his net sales computed at the applicable ceiling prices established by the regulation—during the period involved in the indictment, amounted to $74,146.39 (R. 9).

On April 4, 1946, petitioner's complaint was properly filed in the Emergency Court of Appeals pursuant to Section 204 (e) of the Act (R. 177). On May 9, 1946, petitioner filed with the Court an application for leave to introduce evidence (R. 191). By order of the Court dated May 27, 1946, petitioner's application was granted in part, and he was directed to present the evidence, so far as practicable in affidavit form, to the Administrator, together with such other evidence as the Administrator deemed it necessary or proper to receive (R. 196).

Accordingly, on June 10, 1946, the Administrator entered an order for the introduction of evidence by leave of court (R. 1). On July 11, 1946, petitioner filed with the Court a motion for an order requiring the Administrator to produce various materials (R. 197). On July 19, 1946, the Administrator filed his objections to the motion with an accompanying memorandum (R. 200–210), stating that he would furnish the petitioner with all the evidence material to petitioner's case which was in his possession and control, but that petitioner "was informed prior to the filing of the motion that the information presently requested was not available" (R. 201). On July 24, 1946, the Court entered an order denying the motion (R. 211).

On August 2, 1946, petitioner filed his evidence with the Administrator (R. 6–27, 50–134). On August 28, 1946, the Administrator entered an

order providing petitioner with an opportunity to present further evidence (R. 29), and by orders entered on September 5, 1946 (R. 30), and September 23, 1946 (R. 31), petitioner's time to file this evidence was extended to October 1, 1946. A further extension of time was denied by an order entered on October 16, 1946 (R. 32).[2]

On November 6, 1946, the Administrator filed with the Court the transcript of the proceedings before him (R. 49). The evidential record was then closed for, under Rules 21 and 22 of the Rules of the Emergency Court, the time for the filing of petitioner's brief commenced to run. 50 U. S. C. App. (Supp. V), fol. 924. On November 19, 1946, petitioner filed with the Court his motion for leave to subpoena and examine certain named witnesses, all of whom either then were, or had been, officers and employees of the Office of Price Administration (R. 214).

On November 27, 1946, the Administrator filed his answer to this motion asserting that: (1) "the motion is dilatory and has been filed out of time for the sole purpose of delaying this proceeding;" (2) the testimony of the requested witnesses was unnecessary to the proper disposition of the case; and (3) the testimony was both privileged and immaterial (R. 217–218).

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[2] The uncontroverted reasons for this denial appear in the opinion accompanying this order (R. 33–34).

On December 5, 1946, the Court entered an order denying the motion (R. 219), and on December 20, 1946, the Court denied petitioner's motion for reconsideration (R. 225).

The case was ultimately briefed and argued on the merits, and on April 23, 1947, the Court handed down its opinion upholding the validity of the regulation (R. 225–233), and entered judgment dismissing petitioner's complaint (R. 234).

ARGUMENT

As drawn, the instant petition purports to raise interesting, but unfortunately only academic, constitutional issues concerning the right of an individual to secure compulsory process from the Emergency Court of Appeals to substantiate contentions as to the invalidity of a regulation. The question actually presented on this record, however, merely concerns an exercise of discretion by the court below, and, as disclosed conclusively by the record, that court did not abuse its discretion in denying petitioner's motion for leave to subpoena and examine certain named witnesses.[3]

[3] Petitioner also contends that the court below erred in denying his motion to produce "certain information in the possession and control of the respondent" (Pet. 2). But the petitioner was furnished with all of the requested information within the possession and control of the Administrator (R. 37–41, 43–46); the Administrator denied that the balance of the requested information was available; and, in denying the motion, the court in effect made a finding in the Administrator's favor on the latter controverted point. Ob-

Petitioner's motion was filed long out-of-time (R. 218) and after the evidential record had been closed. Respondent opposed it as a dilatory motion, and its very consideration fell within the discretion of the court.[4] Moreover, the opinion testimony sought under petitioner's motion was unnecessary to a determination of the validity of the regulation since the official economic and statistical data introduced by the petitioner himself (R. 10, 50–134) could and did furnish an adequate factual basis for that determination (R. 231–232). Finally, and in any event, the testimony of the named Office of Price Administration personnel whom petitioner desired to subpoena was both privileged and immaterial.[5]

CONCLUSION

The decision below is correct, and there is no warrant for review of the questions presented by

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viously, then, there was no error in denying a motion to compel the Administrator to produce immaterial or irrelevant evidence, or information not within his possession and control.

[4] See *supra*, p. 4.

[5] The Administrator's staff may not be examined with respect to their personal knowledge, determinations, or mental operations in arriving at the administrative regulation under review, and their opinions as to the validity of that regulation are irrelevant. See, e. g., *Chicago Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S. 585, 593; *United States* v. *Morgan*, 313 U. S. 409, 422.

the petition. The petition should therefore be denied.

Respectfully submitted.

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STANLEY M. SILVERBERG,
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HARRY H. SCHNEIDER,
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IRVING J. HELMAN,
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Department of Commerce.

JUNE 1947.

APPENDIX

Section 204 of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. (Supp. V) 924, provides in part:

> SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant

in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a

clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in

any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

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